IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

In the Matter of the Establishment
Inspection of:

Nissan Canton Vehicle Assembly Plant
300 Nissan Drive **Case No. 3:16-mj-0163**
Canton, Mississippi 39046

MEMORANDUM OF LAW IN SUPPORT OF NISSAN NORTH AMERICA INC.'S EMERGENCY MOTION TO PARTIALLY STAY INSPECTION WARRANT

COMES NOW, Nissan North America, Inc. ("Nissan"), by and through counsel, and submits its Memorandum of Law in Support of Nissan's Emergency Motion to Partially Stay Inspection Warrant ("Motion to Partially Stay"). Nissan is moving for an emergency stay of the proceedings until the Court shall resolve Nissan's Motion to Partially Quash the Inspection Warrant, filed today, September 2, 2016. Proceedings should be stayed because the warrant obtained by the Occupational Safety and Health Administration ("OSHA") to inspect the Nissan Canton Vehicle Assembly Plant at 300 Nissan Drive, Canton, Mississippi 39046 ("Nissan Canton Plant") is enforceable by the U.S. Marshall, which precludes Nissan from contesting enforcement or seeking judicial review. (See Warrant.)

Nissan requested notice and the opportunity to oppose the issuance of any inspection warrant requested by OSHA along the lines reflected in the warrant that was issued on September 1, 2016, both verbally and in writing. *See Motion Exhibit A, Letter dated August 12, 2016; Exhibit B, Letter dated August 24, 2016.* However, Nissan was not given any such notice or opportunity to present its position to this court prior to the warrant being issued. Based on several misleading statements and the complex legal issues raised, Nissan believes that it is entitled to be heard on these matters in the interest of justice.

Nissan has filed a motion to partially quash the warrant, on the grounds that its enforcement—specifically, the allowance of members of a self-titled "Nissan Workers Organizing Committee" to attend the inspection as walk-around representatives—would violate rights protected under the Fourth Amendment to the U.S. CONSTITUTION, the Administrative Procedure Act, and the OSH Act. Nissan does not deny inspection rights to the OSHA investigators, and has consistently provided access to OSHA and any proper representatives. The only objection at issue in this matter is OSHA's improper designation of the "Nissan Worker's Organizer's Committee" to act as the employee representative.

I.
BACKGROUND

OSHA's warrant to inspect the Nissan Canton Vehicle Assembly Plant at 300 Nissan Drive, Canton, Mississippi 39046 ("Nissan Canton Plant") includes a provision to include certain members of a purported "Nissan Workers Organizing Committee" to attend the inspection.

As background, in early August, Compliance Safety and Health Officer ("CSHO") James Oglesby arrived at the Nissan North America, Inc. ("Nissan") production facility in Canton, Mississippi (the "Canton Plant") and requested to conduct a plant inspection related to an accident that Nissan had self-reported in late July. After speaking with Nissan representatives, the CSHO rescheduled the inspection for Friday, August 12, 2016, so that the individuals who had witnessed the accident could be present for interviews.

Mr. Oglesby requested that two specific individuals who were not involved in the accident in any way – Ms. Patricia Ruffin[1] and Mr. Joseph Wilson – participate in the inspection. On August 10, 2016, Mr. Oglesby confirmed that the only reason he was requesting the

[1] OSHA represents that representatives from the Nissan Workers Organizing Committee participated in a March 2016 OSHA inspection. (OSHA Application for Administrative Inspection Warrant at ¶ 5). While Patricia Ruffin was present for the inspection, at that time, Nissan assumed she had substantive involvement in the matter and had no indication from OSHA or otherwise that Ms. Ruffin was involved in a Nissan Workers Organizing Committee.

participation of Ms. Ruffin and Mr. Wilson is that they are UAW labor organizers and that they have selected themselves to represent employees during OSHA safety inspections.

Nissan advised Mr. Oglesby that neither Ms. Ruffin nor Mr. Wilson are legally authorized to represent the safety interests of employees of the Canton Plant, for at least two reasons:

- First, their presence is not necessary for an effective and thorough inspection, and they do not have any special expertise that would contribute to the inspection. Neither Ms. Ruffin nor Mr. Wilson are maintenance employees. Neither of them even worked in the zone where the accident occurred, or on the shift when the accident occurred. They are unfamiliar with the relevant tasks and procedures, and they cannot provide pertinent details of the work being performed.

- Second, the OSHA Field Operations Manual (CPL 02-00-160) expressly forbids OSHA's involvement in a labor dispute. Indeed, the Manual states, "Under no circumstances are CSHOs to become involved in an on-site dispute involving labor management issues or interpretation of collective bargaining agreements." (Ch. 3, IV, G.3.) By allowing participation in the inspection by such non-designated, unqualified individuals, who lack personal knowledge of the injury or procedures performed at the time of the injury, OSHA would be lending its credibility in support of a labor organizing cause that is "off limits" pursuant to its own Guidelines.

See Motion Exhibit "A", Letter from M. Jicka to E. Stewart dated August 12, 2016. Nissan made clear that it was prepared to go forward with the inspection and to provide access to OSHA and its proper representatives to conduct the inspection. Nissan's objection applied only to individuals that, like Ms. Ruffin and Mr. Wilson, have no legal standing to participate in the inspection. *Id.* Further, in the event OSHA went forward to seek a warrant to compel access by Ms. Ruffin and Mr. Wilson, Nissan requested that OSHA present its letter be presented to the court, and that Nissan be given notice and the opportunity to oppose the issuance of a warrant.

Approximately two weeks later, OSHA Area Director Eugene Stewart advised that OSHA had received a new complaint related to the Canton Plant. In connection with that complaint, Mr. Stewart asked whether Nissan would allow the members of a purported threeperson "Nissan Workers Organizing Committee" to attend the inspection as a walk-around representative. Mr. Stewart did not identify the names of the members of the purported committee, but simply inquired whether Nissan would permit such persons to attend. He did not advise whether the members of the purported committee had any expertise that would contribute to the inspection, or whether they were members of the safety committee that exists at the facility.

Nissan again objected to OSHA's request, for the same reasons articulated in its August 12 letter. *See Motion Exhibit "B", Letter from M. Jicka to E. Stewart dated August 24, 2016.* Specifically, Nissan noted that members of purported self-titled "Nissan Workers Organizing Committee" are not legally authorized to represent the safety interests of employees of the Canton Plant, and that is unlawful under the National Labor Relations Act for Nissan to recognize or deal with a labor organization that has not been selected by a majority of employees in an appropriate unit. As such, Nissan cannot lawfully recognize such a committee, and disagreed with any assertion that it has any standing at the Canton Plant. Nissan further noted that, by requesting their participation, OSHA is lending its credibility in support of a labor organizing cause that is "off limits" pursuant to its own Guidelines.

In the event OSHA were to seek a warrant to compel access, Nissan requested that OSHA present its August 24 letter and its prior letter to the court. Additionally, consistent with the earlier letter, Nissan requested notice and the opportunity to oppose the issuance of a warrant. *Id.* That opportunity was not provided.

There are no unions certified or recognized as representing the employees at the Nissan Canton Plant, and any individuals on the purported committee are not legally authorized to represent the safety interests of employees at the Nissan Canton Plant.

II.
LEGAL ANALYSIS

"[T]he Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil . . . investigations." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)(holding that § 8(a) of the OSHA Act, 29 U.S.C. § 657(a), is unconstitutional to the extent it permits warrantless inspections). That is because the "owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents." Id. at 315*; see also Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984)(noting that government officials may not "make nonconsensual entries into areas not open to the public" in a business). "The primary motivation behind the application of the rule in civil cases is to "protect citizens from the 'unbridled discretion [of] executive and administrative officers.'" *Bruce v. Berry*, 498 F.3d 1232, 1240 (11th Cir. 2007) (quoting *Barlow's*, 436 U.S. at 323). While the standard for the issuance of an administrative inspection warrant is not stringent, the Court must be satisfied that the search request is not the product of mal-intent or arbitrariness by a vindictive employee or abusive "field inspector." *West Point-Pepperell v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982).

A. Standard for Granting an Emergency Motion to Stay

The grant of an emergency motion to stay is an exceptional response which should be granted to Nissan. The court has discretion to stay its proceedings for the purpose of judicial economy and in its own interests and the interests of the litigants before it. *See Landis v. North American Company,* 299 U.S. 248, 254-55 (1936); *Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."). The court must weigh the interests of the parties in determining whether to stay proceedings. *See, e.g., Dominguez v. Hartford Financial Services Group, Inc.*, 530 F. Supp. 2d 902, 905 (S.D. Tex. 2008), citing *Landis*, 299 U.S. at 254-55.

How to best manage the court's docket "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. In deciding whether to stay litigation, courts usually consider three factors: (1) whether a stay will unduly prejudice or present a clear tactical disadvantage to the nonmoving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set. *See, e.g., Norman IP Holdings, LLC v. TP-Link Technologies, Co.*, No. 6:13-CV-384-JDL, 2014 U.S. Dist. LEXIS 143426, 2014 WL 5035718, at *2 (E.D. Tex. Oct. 8, 2014) (citing *Soverain Software LLC v. Amazon.com, Inc.*, 356 F. Supp. 2d 660, 662 (E.D. Tex. 2005)).

1. OSHA Will Not Be Prejudiced or Disadvantaged by a Stay.

OSHA inspections are fundamentally different from criminal and other searches pursuant to warrants. Unlike a criminal proceeding where a defendant may "flush" evidence, "the risk that the employer will correct the violations before the inspector reappears is not really seen as a problem: if the violations are permanently corrected, then the ultimate objective of the inspection system has been achieved." 5 Wayne R. Lafave, SEARCH AND SEIZURE § 10.2(e) (4th ed. 2009). Moreover, nothing about the requested stay stops OSHA from immediately beginning an inspection – the only limitation is on who will participate in the walkaround inspection. Indeed, even in the context of injunctive relief, mere delay of government enforcement does not constitute sufficient harm to deny relief. *See e.g., Rogers Group, Inc. v. City of Fayetteville*, 639 F.3d 784, 789–90 (8th Cir. 2010) (delay in enforcement of new city ordinance); *Glenwood Bridge v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991) (delay caused by grant of injunctive relief was insufficient to deny request); *Coteau Properties Co. v. Dep't of Interior*, 53

F.3d 1466, 1480 (8th Cir. 1995) (government agency seeking to enforce a new decision would suffer no harm from delay).

On the other hand, absent a stay, Nissan will suffer irreparable damage to its Constitutional rights under the Fourth Amendment and legal rights under existing OSHA law. Numerous courts have held that the occurrence of an unauthorized intrusion of the government into a private workplace to conduct an inspection causes injury. *See Cerro Metal Products v. Marshall*, 620 F.2d 964, 974 (1980)(citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)). In finding that an unauthorized OSHA inspection constitutes irreparable harm, the *Cerro* decision acknowledged:

> a typical OSHA inspection is more than an unobtrusive scrutiny. Inspections of entire plants referred to as "wall to wall" in agency jargon frequently extend over several weeks.[27] They necessarily create inconvenience to the employer and a certain amount of lost time for employees who escort the inspector or are otherwise disrupted in their work. Even if no violations were found and no citations issued, an employer would not regard such an inspection as benign.

Id. at 974; s*ee also U.S. Chamber of Commerce v. Dep't of Labor*, 174 F.3d 206 (D.C. Cir. Apr. 9, 1999) ("The Chamber of Commerce asserts, and the agency does not deny, that as a practical matter being subjected to a safety inspection can be quite as onerous for an employer as paying a fine imposed by the OSHA."); *Taylor Diving & Salvage Co. v. Department of Labor*, 537 F.2d 819, 821 (5th Cir. 1976)(granting stay pending appeal of OSHA rulemaking). Even if OSHA issued no citations or penalties following an inspection, the employer will never get that time and interruption of its business back – the loss and injury is permanent and irreparable.

2. A Stay Is Necessary To Brief and Develop the Issues Through Briefing and Allow the Court to Reach a Considered Decision on the Merits.

The second and third considerations also support a stay of the warrant provision regarding whom may participate in the walkaround inspection. Although Nissan has filed a Motion to Partially Quash the Warrant, OSHA has not had an opportunity to respond to the Motion. Further, no evidentiary issues have been outlined or scheduled for a hearing if necessary. Staying the warrant in relevant part would allow full development and simplification of the issues so that the Court may reach a considered decision.

B. Nissan Will Prevail on the Merits

Although granting a stay is not dependent upon a showing that the moving party will prevail on the merits, Nissan asserts that it will prevail. Section 8(e) of the OSH Act provides that, "[s]ubject to the Secretary's regulations, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . for the purpose of aiding such inspection." 29 U.S.C. § 657(e).[2] The subsequently enacted OSHA regulation, titled "Representatives of employers and employees," states in relevant part:

> Compliance Safety and Health Officers shall be in charge of inspections and questioning of persons. A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace for the purpose of aiding such inspection. A Compliance Safety and Health Officer may permit additional employer representatives and additional representatives authorized by employees to accompany him where he determines that such additional representatives will further aid the inspection. A different employer and employee representative may accompany the Compliance Safety and Health Officer during each different phase of an inspection if this will not interfere with the conduct of the inspection.

29 C.F.R. § 1903.8(a). Following its enactment, this regulation has been consistently interpreted by OSHA to provide for accompaniment by a labor union *only* where such a union was certified

[2] Notably, OSHA only partially quotes Section 8(e) of the OSH Act in its *Ex Parte* Application for Administrative Inspection Warrant. OSHA fails to include the language that the employee representative is given an opportunity to accompany the Secretary during a physical inspection "for the purpose of aiding such inspection." 29 U.S.C. § 657(e). OSHA Application for Warrant at ¶ 15. Indeed, OSHA provides no support for how these individuals would "aid such inspection."

or recognized as representing the employees under procedures established by the National Labor Relations Board ("NLRB"). Contrary to the recent holding of the Supreme Court in *Encino Motorcars v. Navarro*, 2016 U.S. LEXIS 3924, 84 U.S.L.W. 4424 (2016), OSHA's New Rule is also arbitrary and capricious because it provides no recognition of, or explanation for, the agency's departure from long established policy. Indeed, under the National Labor Relations Act ("NLRA"), a union cannot be an authorized collective bargaining agent of employees unless it has been certified as representing a majority of employees in an appropriate bargaining unit by the National Labor Relations Board or voluntarily recognized as such by the employer, with limited exceptions not pertinent to this matter.

There are no such certified or authorized representatives at the Nissan Canton Plant. There are no unions, certified or recognized, representing employees at the Nissan Canton Plant pursuant to the procedures of the NLRB, and therefore the individuals on the purported "Nissan Worker's Organizer's Committee cannot be "authorized representatives. In fact, it is unlawful under the NLRA for Nissan to recognize or deal with a labor organization that has not been selected by a majority of employees in an appropriate unit.

III.
REQUEST FOR RELIEF

Based on the foregoing, Nissan respectfully requests that the Court stay the application of OSHA's warrant to inspect the Nissan Canton Plant with the "Nissan Worker's Organizer's Committee", pending the Court's ruling on Nissan's Motion to Partially Quash the Inspection Warrant. Nissan reiterates that it has no objection to OSHA conducting the inspection with its own personnel and with the hourly employee representative of the existing Nissan Safety Committee.

Respectfully submitted this 2nd day of September, 2016.

/s/Mark D. Jicka

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CERTIFICATE OF SERVICE

I, Mark D. Jicka, do hereby certify that I have served the above and foregoing with the Court and on each of the following:

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This the 2nd day of September, 2016.

s/Mark D. Jicka
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